Supreme Court, U.S.
FILED

97 1093 DEC 30 1997

OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STANTON D. SHIFMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

ANTHONY R. RIZZO
Counsel of Record
99 Walnut Street
Saugus, Massachusetts 01960
(781) 231-5600

ROBERTA GOLDEN
41 Pleasant Street
Framingham, Massachusetts 01701
(508) 879-7373

62 pp

QUESTIONS PRESENTED

I. Did the decision of the First Circuit Court of Appeals conflict with decisions of other United States Courts of Appeal on a similar matter, thus denying Appellant's Sixth and Seventh Amendments Rights?

II. Did the decision of the First Circuit Court of Appeals conflict with decisions of other United States Courts of Appeal in interpreting the due process clause of the Fifth Amendment?

III. Did the decision of the First Circuit Court of Appeals conflict with the interpretation of Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act as previously set out in the United States Supreme Court?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF CASE 1

REASONS FOR GRANTING CERTIORARI 4

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page**

Anderson v. Butler, 23 F.3d 593, 595 (1st Cir. 1994) 9, 11

Baumer v. Pachi, 8 F.3d 1341 (9th Cir. 1993) 18, 19

Bembury v. Butler, 968 F.2d 1399 (1st Cir. 1992) 9

Bolen v. Paragon Plastics, Inc., 747 F. Supp. 103, 106 (D. Mass. 1990) 14

Bruton v. United States, 391, U.S. 123, 135; 88 S. Ct. 1620, 1627 (1968) 16

Carella v. California, 491, U.S. 263, 265; 109 S. Ct. 2419, 2420 (1989). 9, 10, 11

Chapman v. California, 386, U.S. 18, 24; 87 S. Ct. 824 (1967) 16

Davis v. Alaska, 415, U.S. 308 at 318; 94 S. Ct. at 1110, 1111 (1974) 16

Duncan v. Louisiana, 319 U.S. 145, 149 (1968) 7

General Electric Co. v. Lyon, 894 F. Supp. 544, 554 (D. Mass. 1995) 14

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4, 1 L. Ed. 483, 484 (1794) 8

Hill v. Maloney, 927 F.2d 646 (1st Cir. 1990) 10, 12

In re D. Federico Co., Inc. 8 B.R. 888 (D. Mass. 1981) 15

In re Winship, 397, U.S. 358, 90 S. Ct. 1068 (1970) . 9, 11

Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 700 (1982) 20

Ivan Allen Co. v. United States, 422 U.S. 617, 623-24 (1975) 20

Lambert v. Wicklund, 117 S. Ct. 1169, 1170 (1997) 20

Lewis v. Holy Spirit Assn. for the Unification of World Christianity, 589 F. Supp 10, 13 (D. Mass. 1983) 14

NLRB v. International Assn. of Bridge, Structural & Ornamental Ironworks, Local 480, 466 U.S. 720, 721 (1984) 20

Oregon Dept of Fish and Wildlife v. Klamath Trike, 473 U.S. 733, 764 (1985) 21

Reves v. Ernst & Young, 507 U. S. 170, 113 S.Ct. 1163 (1993) 17, 18

Reves, Stone v. Kirk, 8 F.3d 1079, 1081-1082 (6th Cir. 1993) 19

Sandstrom v. Montana, 422, U.S. 510, 513, 524, 99 S. Ct. 2450, 2453, (1979) 9, 10

Santabello v. New York, 404 U.S. 257, 262 (1971) . . 14, 15

Saxbe v. Washington Post Co., 417 U.S. 843, 846 (1974) 20

Schmid v. National Bank of Greece S. A., 622 F. Supp. 704 (D. Mass. 1985) 15

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 534-535 (1983) 20

United States v. Argentine, 814 F.2d 783, 789 FN8 (1st Cir.1987) 3, 8

United States v. Baldacchino, 762 F.2d 170, 179 13

United States v. Biaggi, 909 F.2d 662 (2nd Cir 1990) 5, 7, 9, 12

United States v. de la Cruz-Paulino, 61 F.3d 986, 998 (1st Cir. 1995) 10, 11

United States v. Detrich, 865 F.2d 17 (2d Cir. 1988) . . . 7

United States v. Garcia, 698 F.2d 31 (1st Cir. 1983) . . . 15

Unites States v. Hastings, 461 U.S. 499 103 S.Ct. 1074 (1983) 16

United States v. Hogan, 862 F.2d 386, 388 (1st. Cir. 1988) 13, 14, 15

United States v. Johnson, 718 F.2d 1317, 1325 (5th Cir. 1983) 7, 8

United States V. Loder, 23 F.3rd 587 (1st Cir. 1994) . . . 10

United States v. Larenzetti, 467 U.S. 167 (1984) 20

United States v. McLaughlin, 957 F.2d 12, 16 (1st Cir 1992) 13

United States v. National Bank of Commerce, 472 U.S. 713, 719 (1985) 20

United States v. Polumbo, 897, F.2d 245, 246 (7th Cir 1990) 13

United States v. Reifsteck 841 F.2d 701 (6th Cir. 1988) 5

United States v. Serrano, 870 F. 2d, (1st Cir 1989) . 10, 11

United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969) 8

United States v. Valencia, 907 F.2d 671, 680 (7th Cir. 1990) 11

United States v. Weiner, 3 F.3d 17, 24 (1st. Cir. 1993) . . 17

United States v. White Horse, 807 F.2d 1426, 1429 (8th Cir. 1986) 7

United States v. Young, 470 U.S. 1, 16, 105 S.Ct. 1038, 1047 (1985) 16

University of Maryland at Baltimore v. Peat, Marwick, Maine & Co., 996 F.2d 1534, 1539 (4rd Cir. 1993) 19

Yates v. Evatt, 500 U.S. 391, 400, 111 S. Ct. 1884 9

Statutes:

18 U.S.C. § 1962 (c) & (d) 1, 17, 19

18 U.S.C. § 892 1

18 U.S.C. § 894 . . . . . .1, 2

18 U.S.C. § 891(3) 16

Rules:

Fed. R. Crim. P. 12(b)(2) 17

Fed. R. Crim. P. 26.3 3

Other Authority:

Stern, Gressman, Shapiro and Geller, Supreme Court Practice (7th ed. 1993) 20

Wigmore on Evidence (J. Chadbourn rev. ed. 1979) . 5, 7, 9, 12

Wigmore on Evidence (Tillers Rev. 1983) 5

John D. Calamari, Joseph M. Perilo, Contracts (1997) 13

APPENDIX

Appendix A - Order of the United States Court of Appeals for the First Circuit Entered November 24, 1997 . . . . . A1

Appendix B - Order of the United States Court of Appeals for the First Circuit dated October 1, 1997 . . . . . A3

Appendix C - Judgment of the United States Court of Appeals for the First Circuit dated August 19, 1997 . . . . . A5

Appendix D - Decision of United States Court of Appeals for the First Circuit dated August 19, 1997 . . . . . A7

Petitioner Stanton D. Shifman respectfully petitions for a Writ of Cetiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix herein.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 19, 1997 and denied the Petition for Rehearing on October 1, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act, Sec. 1962(c) of Title 18 is set forth below:

18 U.S.C. sec. 1962(c) makes it unlawful:

> "for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

STATEMENT OF CASE

In October of 1993, the appellant Stanton Shifman was indicted for violations of 18 U.S.C. Sec. 1962, 18 U.S.C. 892, and 18 U.S.C. Sec. 894. On June 12, 1996, a federal jury returned verdicts of guilty on four counts for violations of 18 U.S.C. 892 and returned a verdict of not guilty on one count for a

violation of 18 U.S.C. Sec. 894. The appellant was sentenced on September 4, 1996.

Stanton Shifman, whose activities pertained only to the loan-sharking side of the operation and nine others, were indicted on October 14, 1993. Shifman was tried separately from the others. The government's evidence consisted primarily of the testimony of the alleged victims of the loan-sharking activities, seized records of loans and admissions made by Shifman to law enforcement officials.

Undisputed evidence showed that Joseph Yerardi operated a large-scale gambling and loan-sharking operation enterprise that made loans to borrowers at weekly interest rates of from 3 percent to 5 percent. These rates translate into annual interest rates of from 153 percent to 260 percent. The maximum legal rate allowed in Massachusetts is 20 percent. Mass. Gen. Laws ch. 271, sec. 49.

Shifman first came into contact with Yerardi when he needed the loan shark's services because of his own mounting debts. Shifman subsequently borrowed from Yerardi numerous times and on each occasion made interest payments of 3 or 4 percent a week. At times, Shifman fell behind in his weekly payments and was threatened with physical injury by a Yerardi employee, Jack Murphy also known as Jack Kelley. At some point, Yerardi allegedly encouraged Shifman to refer anyone he knew in need of money to Yerardi. In return for these referrals, which totaled approximately ten over twelve to sixteen month period, Shifman allegedly received either fees from the borrowers or "points" – a reduction in the interest rate on his loan – from Yerardi. A police officer testified that Shifman admitted to him that Yerardi would reduce his debt after he referred a customer who proceeded to take out a loan from Yerardi.

Much of the testimony came from the other borrowers.

At trial, prior to opening statement Shifman filed a pleading styled Motion in Limine to allow the defendant to introduce evidence of his conduct subsequent to June of 1991. In his Motion in Limine, Shifman made an offer of proof for the

purpose of introducing evidence on the issue of his consciousness of innocence. In substance, Shifman outlined for the Court the nature of the evidence he anticipated proving and sought the approval of the Court to authorize an opening statement consistent with the motion. In support of the motion he filed a memorandum of law. The government filed an opposition styled Motion in Limine to preclude mention of "authorization" defense.

It asserted in substance that, "The Government has stipulated that it will not introduce in its case-in-chief any evidence of Shifman's conduct subsequent to June of 1991."

After the filing of these motions the Court ruled that the post June cooperation of Shifman with the Government would not be introduced at trial.

On June 3, 1996, the Government in the opening statement, directed the jury's attention to the seven counts of the indictment and identified each count advising the jury that " defendant Shifman, "told half the story and the rest of the story will be told by the remaining witnesses who will come into this courtroom."

Thereafter, the defense moved the Court for a mistrial, for the Government's assertion in opening, that Shifman ".. went to the authorities in June of 1991" and the claim that Shifman ".. told half the story."

Shifman argued that the trial judge should have on a procedural basis, (See Fed. R. Crim. P. R.26.3) either granted a mistrial, or in the alternative, advised the jury of the nature of the Government's pre-trial stipulation that only guilty conduct of c-conspirators would be proven after June of 1991. The failure of the Court to do so, Shifman contends, is reversible error. The standard to be applied as to whether of not an action taken or not taken by a Judge is reversible error is that, "some reasonable possibility that the error is of Constitutional dimensions influenced the jury in reaching [its] verdict," then in this event the conviction must be vacated. See *U.S. v. Argentine*, 814 F.2d 783, 789 Fd.8 (1st Cir. 1987).

In an argument made prior to his opening addressing the impact on the case, Shifman's counsel advised the Court that a clear ruling was made that nothing was to be mentioned concerning conduct of Shifman after June of 1991 and that, the opening statement of the defendant, was drafted around that ruling.

The defense counsel then moved for a mistrial, which the Court summarily denied stating that "the matter with respect to what evidence is admissible in the trial is one I do not decide now." The court then stated, " As to whether any evidence of what occurred after that is admissible, I will rule on it when I have more explicit proffers of evidence before me." The Court "Well, I am not going to preclude him from saying what he wishes in the light of what I have said previously, that of course I have instructed and will instruct the jury again that what counsel says in opening statement is not evidence and if he makes any promises to offer in evidence something I have not ruled on he is doing it at his peril."

REASONS FOR GRANTING CERTIORARI

The Court should grant the writ in order to resolve the conflicts within the Courts of Appeal regarding the impact of consciousness of innocence evidence as it effects defendant's Fifth, Sixth and Seventh Amendment rights and the interpretation of 18 U.S.C. Sec. 1962(c).

Did the Decision of the First Circuit Court of Appeals Conflict With Other Decisions of Other United States Court of Appeals On Similar Matters, Thus Denying Appellant Sixth And Seventh Amendment Rights.

Prior to the defendant's indictment, in June of 1991, he voluntarily went to the police and co-operated and assisted in the investigation of Joseph Yerardi who would later become a co-defendant. As a result of speaking with the police, Shifman was interviewed by the Deputy District Attorney of Norfolk County

and the Massachusetts State Police and provided openly and honestly, all the information he had relating to Joseph Yerardi and others. After co-operating with Massachusetts's authorities, Mr. Shifman was informed that the Federal Government was also conducting an investigation of Joseph Yerardi and would be better equipped to utilize Shifman's services. As a result, Mr. Shifman was placed in contact with the FBI, IRS Criminal Investigation Division and the United States Attorney's Office.

The Government moved to exclude any evidence concerning the defendant's conduct subsequent to June of 1991, when the defendant voluntarily assisted and co-operated with law enforcement. The defendant expressly opposed the government's motion on the grounds that this evidence was relevant to his case. The defendant still maintains after trial that such evidence was relevant not only to obtain a fair trial through a complete presentation of all the evidence surrounding the defendant's conduct and subsequent indictment, but also to demonstrate Shifman's innocent state of mind.

"If guilt leaves the physiological mark which we term consciousness of guilt", and if this is available as evidence, then the absence of that mark (which for want of a better term may be spoken of as "consciousness of innocence) is some indication of the absence of guilt." *Wigmore on Evidence*, sec. 293 at 231 (J. Chadbourne rev. ed. 1979). The Sixth Circuit holds, "There are principles by which a defendant may occasionally avail himself of conduct as evidence in his favor-in particular, or conduct indicating consciousness of innocence". *U.S. v. Reifstock*, 841 F.2d 701 (6th Cir. 1988). J. Wigmore, *Wigmore on Evidence*, Sec. 56.1 at 1180 (Tillers Rev. 1983).

In the Second Circuit in *U.S. v. Biaggi*, 909 F.2d 662 (2nd Cir. 1990), one of the defendants appealed his conviction claiming in part that it was error to exclude evidence of immunity negotiations that he contends were admissible to prove his "consciousness of innocence". Specifically, the defendant was offered immunity if he agreed to co-operate and assist the government by providing information about the wrongdoing of his co-defendants. However, he denied any knowledge of

wrongdoing and rejected the government's offer of immunity. *Id* at 690. The government, in turn, argued that they had in fact rejected an offer of immunity for the defendant because they believed the defendant's allegation of innocence was not credible. The Court, however, determined that: the inference is the same whether the immunity offer is viewed as 'rejected' by [the defendant's] inability to satisfy the Government's assessment that its condition was not satisfied." *Biaggi* at 690.

It was the defendant's contention and the Appeals Court concurred, that his rejection of an offer of immunity should have been presented to the jury as it would demonstrate to the jury that he had an innocent state of mind when confronted by the government. Further, it was argued that the exclusion of the defendant's state of mind evidence denied him a fair trial. *Id* at 691. The Court found that although there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would by inculpated, the mere fact that the jury might not draw the inference urged by the defendant does not strip the evidence of probative force. *Id* at 691. As Dean Wigmore has written with regard to consciousness of innocence:

> "Certainly in the inferences of ordinary life we attach as much weight to that inference as to the inference of consciousness of guilt; the bearing of one accused person as consciously innocent impresses us no less strikingly than the bearing of another as consciously guilty. Moreover, it is judicially conceded that the inference of consciousness of guilt is a highly dubious one, and that the evidence is never to be emphasized or treated as of much value. If this be so, why should we strain a doubt to admit a dubious inference against the accused, and yet refuse to admit in his favor a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the sp[irit] of our law. *Let the accused's whole*

> *conduct come in; and whatever it tells for consciousness of guilt or for consciousness of innocence let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from consciousness of innocence and its natural manifestations."*
>
> J. Wigmore, 2 *Wigmore on Evidence* Sec. 293 at 232 (J. Chadbourn rev. ed.) 1979) (emphasis added). See also *United States v. Biaggi*, at 691. "Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, denying him a fair trial, we have not hesitated to order a new trial." *Biaggi*, at 692; *U.S. v. Detrich*, 865 F.2d 17 (2d Cir. 1988).

Evidence of the defendant's consciousness of innocence in this matter should have been presented to the jury. "The constitutional right to a jury trial for serious criminal offenses is both a fundamental individual right and a right 'fundamental to the American scheme of justice'". *United States v. White Horse*, 907 F.2d 1426, 1429 (8th Cir. 1986); quoting *Duncan v. Louisiana*, 319 U.S. 145, 149 (1968).

The defendant, Shifman, submits that it was for the jury to decide what weight to give the evidence of the defendant's consciousness of innocence and what inferences could have been drawn from that evidence. "The jury's function is the 'independent determination of the facts, and the application of the law ... to the facts ...". *United States v. Johnson*, 718 F.2d 1317, 1325, (5th Cir. 1983).

The distinction between judge and jury is one which has been passed down throughout the history of the American system of justice beginning with the very first jury trial in the United States Supreme Court. "In the first jury trial conducted in the United States Supreme Court, Chief Justice John Jay, after stating the facts were undisputed and giving the Court's unanimous opinion about the law, nevertheless reminded the

jurors: "(O)n questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge both, and to determine the law as well as the fact in controversy." *United States v. Johnson*, at 1322; quoting *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4, 1 L.Ed. 483, 484 (1794). "The jury may not be relegated to deciding only questions that the judge thinks to be factual." *Johnson* at 1322.

Further, even in the First Circuit, it was determined that "the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judge's could call the turn." *U.S. v. Argentine*, 814 F.2d 783, 788 (1st Cir.); quoting *U.S. v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969). See also *United States v. Johnson*, 718 F.2d 1317, 1325 (5th Cir. 1983) By prohibiting evidence of Mr. Shifman's "consciousness of innocence" the court impermissibly "call[ed] the turn" by " penetrating the private precincts of the sitting jury and transgressing the appellant's sixth and seventh amendment rights". *U.S. v. Argentine*, 814 at 788. Mr. Shifman had a right to the free and uninhibited exercise by the jury of all its powers. *Id.* The probative value of evidence of Mr. Shifman's consciousness of innocence was for the jury to determine. The jury has the power to accept it, reject it or to find it insufficiently persuasive *Id.* No matter what the jury's determination may have been, it was for the jury to make that determination and not a matter to be excluded in limine by the trial judge.

The defendant should have been allowed to introduce any and all evidence that he voluntarily presented to the police and subsequently co-operated with and assisted in the state and federal investigation of the loansharking operation of Joseph Yerardi. The defendant submits that the jury should have been apprised of all of the facts and circumstances surrounding the defendant's conduct and subsequent indictment in this matter. "Let the accused whole conduct come in; and let the jury decide as to whether it tells for consciousness of guilt or consciousness

of innocence." J. Wigmore, 2 *Wigmore on Evidence*, Sec. 293, at 232 (J. Chadbourn rev. ed. 1979).

As an innocent person, presumed so until proven to the contrary beyond a reasonable doubt, Mr. Shifman should not have been deprived of the inference which common sense draws from the consciousness of innocence and its natural manifestations. J. Wigmore, 2 *Wigmore on Evidence*, Sec. 293, at 232 (J. Chadbourn rev. ed. 1979).

Mr. Shifman's whole conduct should have been allowed as evidence, and it was for the jury who had the burden to determine whether it tells for consciousness of guilt or for consciousness of innocence not the trial judge. J. Wigmore, 2 *Wigmore on Evidence*, Sec. 293, at 232 (J. Chadbourn rev. ed. 1979). The exclusion of Mr. Shifman's state of mind evidence denied him a fair trial. See *U.S. v. Biaggi* at 691.

Did the Decision of the First Circuit Court of Appeals Conflict With Decisions of Other United States Court of Appeals In Interpreting the Due Process Clause of the Fifth Amendment.

The Due Process Clause of the Fifth Amendment denies the government the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *Carella v. California*, 491. U.S. 263, 265, 109 S.Ct. 2419, 2420 (1989). *In R[illegible]inship*, 397 U.S 358, 90 S.Ct. 1068 (1970). *Anderson v. Butl[illegible]* F.3d 593, 595 (1st Cir. 1994). Jury instructions which tend to shift the burden of proof as to an element of the crime charged to the defendant are violative of due process and run afoul of the Constitution. *Yates v. Evatt*, 500 U.S. 391, 400, 111 S.Ct. 1884, 1891 (1991) *Carella v. California*, 491 U.S. 262, 265, 109 S.Ct. 2419, 2420 (1989); *Sandstrom v. Montana*, 442 U.S. 510, 513, 524, 99 S.Ct. 2450, 2453 (1979); *Bembury v. Butler*, 968 F.2d 1399 (1st Cir. 1992). Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases. *Carella v.*

California, 491 U.S. at 265; 109 S.Ct. at 2420; See *Sandstrom v. Montana*, 442 U.S. at 522, 99 S.Ct. 2458; *Hill v. Maloney*, 927 F.2d 646 (1st Cir. 1990).

Here the court repeatedly instructed the jury as to what the Government need *not* prove. By instructing the jury as to what the government need not prove, the burden of proof shifted to the defendant to establish his innocence by disproving the elements of the crime charged. Although the court did inform the jury as to what the government must prove, the constitutional mandate of proving each and every element beyond a reasonable doubt was lost upon the jury by the impermissible instruction of what the government need not prove. Therefore, the repeated instruction of what the government need not prove was in direct conflict with "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime". *Sandstrom v. Montana*, 442 U.S. at 523, 99 S.Ct. 2459; *Hill v. Maloney*, 927 F.2d 650 (1st Cir. 1990) and invaded the truth–finding task assigned solely to juries in criminal cases. *Carella v. California*, 491 U.S. at 265, 109 S.Ct. at 2420.

Moreover, in its instruction on aiding and abetting, the court failed to properly instruct the jury as to the requisite state of mind of the defendant. In order to be convicted of the charge of aiding and abetting in violation of 18 U.S.C. Sec. 2, the government must prove beyond a reasonable doubt that the principal committed the underlying crime, and that Mr. Shifman associated himself with the venture, participated in it as something he wished to bring about, and sought by his actions to make it succeed. *United States v. Loder*, 23 F.3d 587 (1st Cir. 1994); *United States v. de la Cruz-Paulino*, 61 F.3d 986, 998 (1st Cir. 1995) In order to convict Shifman of aiding and abetting the government must prove beyond a reasonable doubt that he in some way associated himself with the criminal enterprise and that he shared the criminal intent of the principal. *United States v. Serrano*, 870 F.2d 1 (1st Cir. 1989); *United States v. de la Cruz-Paulino*, 61 F.3d 986, 998 (1st Cir. 1995)

In the instant case, relevant to the state of mind element of the crime, the court instructed the jury that the government must prove "that when the defendant did his act the defendant then had the state of mind intending to do something that would be an aid to the other in completing that offense" and that it is "no defense that the defendant may have had other reasons for doing what he did." Based upon the foregoing analysis, Shifman submits that this instruction was erroneous. To convict Mr. Shifman of aiding and abetting, the government must prove beyond a reasonable doubt that Mr. Shifman possessed the same state of mind, as that required for the principal offense. *United States v. Valencia*, 907 F.2d 671, 680 (7th Cir. 1990).

The instruction given by the court directly foreclosed independent jury instruction of whether the facts proved established the state of mind element of the offense with which Mr. Shifman was charged. *Carella v. California*, 491 U.S. at 265; 109 S.Ct. at 2420. The instructions also relieved the Government of its burden of proof articulated in Winship, namely, proving by evidence every essential element of Mr. Shifman's crime beyond a reasonable doubt. *Carella v. California*, 491 U.S. at 266; 109 S.Ct. at 2421; *Anderson v. Butler*, 23 F.3d 593, 595 (1st Cir. 1994). By relieving the prosecution of its burden to prove an essential element of the crime beyond a reasonable doubt, the court deprived Shifman of Due Process in violation of the United States Constitution. *Carella v. California*, 491 U.S. 263, 265; 109 S.Ct. 2419, 2420. (1989); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *Anderson v. Butler*, 23 F.3d 593, 595 (1st Cir. 1994).

Furthermore, in charging the jury as to the defendant's state of mind, the trial court failed to instruct the jury that the defendant's voluntary presentation and co-operation with law enforcement might reflect his innocent state of mind. Whether or not the evidence of the defendant's co-operation with law enforcement shows a consciousness of innocence, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury. *Biaggi*, 909 F.2d 662, 691 (2nd Cir. 1990). As an innocent person, presumed so

until proven to the contrary beyond a reasonable doubt, Mr. Shifman should not have been deprived of the inference which common sense draws from the consciousness of innocence and its natural manifestations. J. Wigmore, 2 *Wigmore on Evidence,* Sec. 293, at 232 (J. Chadbourn rev. ed. 1979). The jury should have been instructed that this evidence may be considered, in light of all other evidence in the case in determining Shifman's state of mind, an essential element of the crime with which he was charged.

In reviewing the challenged instructions, it is conceivable that an appellate court will hold that the instructions on presumption of innocence and the government's burden of proving all the elements of a crime beyond a reasonable doubt are insufficient to cleanse the potentially unconstitutional version of the aiding and abetting instructions. *Hill v. Maloney*, 927 F.2d 651 (1st Cir. 1990), nor will they be sufficient to cure the defect of the instructions which shift the burden of proof from the government to the defendant.

Mr. Shifman voluntarily went to law enforcement and co-operated and assisted in the investigation of Joseph Yerardi. Shifman provided, openly and honestly, all of the information he had relating to Joseph Yerardi and others. Shifman was assured and believed that if he co-operated with law enforcement, everything he said and did would not be used against him. In fact, during one of the conferences with law enforcement, in which Shifman detailed his involvement with Joe Yerardi, Mr. Shifman asked if he needed an attorney. He was informed that as long as he co-operated he would be protected and an attorney was not necessary.

At trail, the court admitted into evidence, over the defendant's objection, testimony by Massachusetts State Police Trooper Michael Scanlon. The testimony pertained to statements allegedly made by Stanton Shifman during an interview with Trooper Scanlon in which Shifman was assisting in the Joseph Yerardi investigation. These statements allegedly made by Mr. Shifman should not have been admitted into evidence.

"Immunity is an important weapon against large scale enterprises, the government often snares big fish, with information gained from little fish." *U.S. v. Polumbo*, 897 F.2d 245, 246 (7th Cir. 1990). "The system works, however, only if each side keeps its end of the bargain; the informant must provide accurate information, and the government must not use that information against the informant." *Id.*

In the instant case, Mr. Shifman was a "little fish" who provided the government with information which enabled them to snare the "big fish" Joseph Yerardi. The system, however, did not work, because the government used the information obtained from Mr. Shifman against Mr. Shifman.

Though a matter of criminal jurisprudence, immunity agreements are in the nature of, subject to, and must be interpreted by contract law principles. *United States v. McLaughlin*, 957 F.2d 12, 16, (1st Cir. 1992); *United States v. Hogan*, 862 F.2d 386, 388, (1st Cir, 1988; *United States v. Baldacchino*, 762 F.2d 170, 179.

Applying contract law principles in the instant case, Shifman's statements should have been suppressed because he had an implied agreement with law enforcement.

"Informal promises of immunity have been recognized and enforced in a variety of circumstances short of defendant's having claimed the Fifth Amendment privilege. *United States v. McLaughlin*, 957 F.2d 12, 16, (1st Cir. 1992) (Co-operation agreements are in the nature of contracts; their effects are strongly influenced by contract law principles[1]). When parties manifest their agreement, as in the instant case, the agreement is implied in fact. John D. Calamari, Joseph M. Perillo, *Contracts* (1977). An implied in fact contract exists if Mr. Shifman conferred a measurable benefit on the government, the government accepted the benefit with the expectation of compensating Shifman; and Mr. Shifman can demonstrate he provided the services with the reasonable expectation of

[1] A co-operation agreement is analogous to a plea bargain agreement. *United States v. Garcia*, 698 F.2d 31 1st Cir. 1983); *Santobello v. New York*, 404 U.S. 257, 262 (1971).

receiving compensation from the government. *General Elec. Co. v. Lyon*, 894 F. Supp. 544, 554 (D.Mass. 1995; *Bolen v. Paragon Plastics, Inc.*, 747 F. Supp. 103, 106 (D.Mass. 1990).

Shifman clearly conferred a measurable benefit upon the government by substantially assisting in their investigation of Joseph Yerardi. *General*, 894 F. Supp. At 554; *Bolen*, 747 F. Supp. At 107; *Lewis v. Holy Spirit Ass'n For the Unification of World Christianity*, 589 F.Supp. 10, 13 (D.Mass. 1983).

Additionally, the government accepted Shifman's services with the exception of compensating him. *General*, 894 F. Supp. At 554; *Bolen*, 747 F. Supp. At 107; *Lewis*, 589 F.Supp. at 13. In order to satisfy this element, it is not necessary that the government had subjectively expected to compensate Mr. Shifman; **rather, the test is whether a reasonable person would have expected to compensate him.** *Bolen*, 747 F. Supp. At 107; *Lewis*, 589 F.Supp. at 13.

Clearly, a reasonable person would have expected to compensate Shifman for the substantial assistance which he provided the government in their investigation of Joseph Yerardi,

The government wanted and needed Shifman's assistance, and induced him to co-operate by informing him he would be protected and did not need an attorney. Then, despite Shifman's assistance, " the government beat him about the ears with his admissions." *United States v. Hogan*, 862 F.2d 386, 388 (1sr Cir. 1988). Due process requires that the government adhere to the terms of any immunity agreement and in the interest of fairness, forbids end runs around them. *Santobello v. New York*, 404 U.S. 257, 262 (1971; *United States v. Hogan*, 862 F.2d 386, 388. In this case, the government has made an end run around their agreement with Shifman.

Shifman had an implied-in-fact agreement with the government. The government breached this agreement by using Shifman's statements against him. "Where the government has breached a [cooperation] agreement, the choice of relief is largely committed to the sound discretion of the court under the circumstances of each." *United States v. Garcia*, 698 F.2d 31, 37 (1st Cir. 1983). In the instant case, because immunity agreements

should be interpreted to insure the defendant what is reasonably due in the circumstances." *Santobello* at 262; *Hogan* at 388, the proper choice of relief would have been to suppress Shifman's statements to law enforcement.

Additionally, if the court fails to find that the conduct between Shifman and the government created an implied–in-fact contract, it may nevertheless find that the government has been unjustly enriched. "Courts imply contracts at law in certain situations to avoid the unjust enrichment of one party at the expense of another." *Schmid v. National Bank of Greece S.A.*, 622 F. Supp. 704 (D.Mass. 1985); *In re D. Federico Co., Inc.*, 8 B.R. 888 (D.Mass. 1981).

The threats, abuse and coercion of Yerardi and his associates, was evidence that the jury should have been able to consider, beginning with the opening statement and continuing with cross-examination in the government's direct case, relative to the question of the nature of Shifman's relationship with Yerardi in the enterprise and how that relationship bore on his state of mind. As trial evidence shows, he advised each victim not to go to Yerardi if there was any alternative. This evidence was part of a continuum, which included both conduct prior to June of 1991 and the conduct alleged in the indictment through August and September of 1991. This was evidence of Shifman's motivation to keep him from harm and bore on his state of mind during the charged period, which was central to the proof of each crime charged. The jury should have been allowed to consider this behavior beginning with a defense statement when the prosecutor completed his opening statement or by the trial judge advising the jury of the stipulation made on June 14, 1995. Shifman had a due process right for the jury to be provided with the stipulation. For this stipulation he waived the opportunity to prove a defense of entrapment by waiving the motion heard on June 12 and 14. Shifman had the right to tell the jury in the opening, of the nature of the relationship he had with the enterprise as, at most, an outsider who was clearly a victim debtor, within the description supplied by the law. See Title 18 U.S.C. Sec. 891(3). The Court's refusal to allow objective proof

of Shifman's state of mind inferred from the payments of debt while co-operating with the government and which evidenced the continuity of debtor relationship was error. It was evidence to be identified and provided in the opening statement to support his defense of a debtor only, to the enterprise owned by Yerardi.

Shifman should not have been fettered or restricted in this regard because payment was made with government money, supplied for that purpose. It was error of Constitutional proportion to exclude such evidence from the jury particularly when he was persuaded to waive a defense to secure the Stipulation. This error was fundamental and undermined the fairness of the trial and contributed to a miscarriage of justice resulting in the finding of guilt in six separate Counts. See *United States v. Young*, 47 U.S. 116; 105 S.Ct. 1038, 1047; 84 L. Ed.2d (1985).

The trial Court's refusal to allow this evidence prevented cross examination of prosecution witnesses on what they may have observed when payment was made thereby violating the confrontation clause of the United Sates Constitution, Amendment VI. The Constitution entitled Shifman to a fair trial and the restriction imposed by the Court affected Shifman's right to cross-examine witnesses and was a violation of due process. *United States v. Hastings*, 461 U.S. 499, 103 S.Ct. 1074, 1090 (1984); *Bruton v. U.S.*, 391 U.S. 123, 135; 88 S.Ct. 1620, 1627 (1968). The standard of proof in this regard requires the reviewing Court to determine beyond a reasonable doubt that the Constitutional error was harmless. *Chapman v. California*, 386 U.S. 18, 24; 87 S.Ct. 824 (1967); *Davis v. Alaska*, 415 U.S. 308 at 318; 94 S.Ct. at 1110, 1111 (1974).

Did the Decision of the First Circuit Court of Appeals Conflict With the Interpretation of Section 1962(c) of the Racketeer Influenced and Corrupt Organization Act as Previously Set out In the United States Supreme Court?

Pursuant to Fed. R. Crim. P. 12(b)(2), Shifman moved the Court to dismiss Counts One and Two of the Indictment which charged him with conspiring to violate and violating the RICO Act respectively. The indictment, however, did not allege facts showing that Shifman played any part in the "operation or management " of the affairs of the alleged RICO "enterprise". The case of *Reves v Ernst & Young,* 507 U.S. 170. 113 S.Ct. 1163 (1993) holds that such proof is an essential element of a RICO violation.

Section 1962(c) of Title 18 makes it unlawful:

> "for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

In its holding in *Reves v Ernst & Young,* 113 S.Ct. 1163 (1993), the Supreme Court adopted a restrictive interpretation of the language, resolving a split in the Circuits. The Court held that to satisfy this provision a RICO defendant must participate in the "operation and management" of the enterprise's affairs. Id. at 1170. See *United States v. Weiner*, 3 f.3d 17. 24 (1st Cir. 1993) (noting *Reves'* adoption of the "operation or management test"). While the Court did not interpret the statute to require a RICO defendant to have a "formal position in the enterprise," it did emphasize that "*some part in directing the enterprise's affairs is required.*" 113 S.Ct. at 1170. (emphasis in original).

Reves makes clear that the RICO Counts against Shifman should have been dismissed. The indictment was utterly devoid of any factual allegations indicating that Mr. Shifman participated in the "operation or management" of the enterprise.

In fact, nothing in the indictment or any evidence produced at trial linked him in any way to the management of the enterprise's affairs. Even as to those few acts of loansharking that Mr. Shifman allegedly aided and abetted, there was no suggestion that he participated at the "operation or management" level. The indictment plainly states that Mr. Shifman simply referred individuals to Yerardi, knowing that Yerardi was a loanshark. Mr. Shifman was not alleged to have played any role whatever in loansharking activities apart from those referrals. In short, Mr. Shifman did not participate at the operation or management level.

The federal appellate cases that have applied *Reves* provide additional support for Shifman's position. In *Baumer v. Pachi*, 8 F.3d 1341 (9th Cir, 1993), the defendant, Pachi, a lawyer, allegedly perpetuated the fraudulent activities of a limited partnership by the following actions: sending a series of letters in an attempt to forestall and cover up the limited partnership" fraud by minimizing the allegedly improper activities of its founders; knowingly filing a false limited partnership agreement that inflated the number of investors; and mailing to other partners copies of the false agreement in order to create the false impression that the limited partnership was a legitimate entity. *Id.* at 1343. Notwithstanding the apparent centrality of the lawyer's role in the fraudulent scheme, and the substantiality of the actions he took on behalf of the partnership, the Ninth Circuit affirmed the lower court's dismissal of the RICO allegations against him. It reasoned that the defendant's involvement in the scheme was only sporadic; that he at no time held any formal position in the limited partnership, nor did he play any part in directing the affairs of the enterprise; and that his role was limited to providing legal services to the limited partnership. *Id.* The court therefore had little difficulty concluding that the defendant did not participate in the "operation or management" of the enterprise. *Id.*

Shifman's alleged involvement in the RICO enterprise here was even more minimal than was the defendant" involvement in the limited partnership scam in *Pachi*. As in

Pachi, Shifman's involvement was only sporadic and he at no time held any formal position in the enterprise. But, unlike Pachi, Shifman played no substantive role whatsoever in the actions that formed the racketeering acts. Shifman's role was significantly less central to the Enterprise's affairs than were those supplied by Pachi. Even conceding that the services Shifman allegedly rendered to Yerardi might suffice for an "aiding and abetting" charge, this does not mean that those sale actions meet the substantially tougher "operation or management" test. As the Third Circuit observed in *University of Maryland at Baltimore v. Peat, Marwick, Maine & Co.*, 996 F2d 1534, 1539 (3d Cir. 1993), another recent case applying Reves.

Simply because one provides goods and services that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result. There must be a nexus between the person and the conduct in the affairs of an enterprise. The operation or management test goes to that nexus. *Id.* at 1539.

The allegations against Shifman present a factual situation similar to that in another case applying *Reves, Stone v. Kirk,* 8 F.3d 1079, 1081-1082 (6th Cir. 1993). In *Stone,* the RICO defendant, Kirk, was a sales representative for the enterprise and allegedly received hidden commissions. *Id.* At 1-3. Even though the Sixth Circuit upheld his liability for violating the securities laws, it reversed the award against him for treble damages under RICO on the ground that he did not participate in the "operation or management" of the enterprise.

In sum, Shifman's alleged participation in the Enterprise's affairs was insignificant. He clearly did not "direct" the Enterprise's affairs. Because the indictment does not allege facts indicating a violation of 18 U.S.C. Sec. 1962(c), the Counts of the Indictment charging Mr. Shifman with a violation of that Statute, and with conspiring to violate the Statute in violation of 18 U.S.C. Sec. 1962(d) should have been dismissed.[2]

---

[2] Because the acts Mr. Shifman allegedly committed do not constitute violation of Sec. 1962(c) his alleged "agree[ment] to personally commit" those acts, see Indictment p. 9, does not constitute a violation of Sec. 1962(d),

In circumstances such as these, where a Court of Appeals fails to follow the clear commands of this Court rendering decisions regarding the enforcement of the Fifth, Sixth and Seventh Amendments rights, this Court has found it appropriate to restore uniformity to federal law and to enforce the commands of its own decisions by granting Certiorari and summarily reversing. See *Lambert v. Wicklund*, 117 S.Ct. 1169, 1170 (1987) (per curiam)("Because the Court's holding is in direct conflict with our precedents, we grant the petition for a writ of certiorari and reverse."); *NLRB v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 480*, 466 U.S. 720, 721 (1984) (per curiam) (Because the Third Circuit's "decision ... apparently is inconsistent with this Court's precedents, we grant the petition for writ of certiorari and reverse."); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-535 (1983) (per curiam) (summarily reversing Court of Appeals decision that could not be "reconciled with Supreme Court precedent 'the clear import of which' [o]ther federal courts have had no difficulty in following.")

Other well established grounds for granting Certiorari are found in the following examples: *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982) (a conflict between the Third and Fifth Circuits regarding federal discovery rules); *United States v. Lorenzetti*, 467 U.S. 167 (1984) (certiorari granted to review Third Circuit Opinion that recognized that its interpretation of a Statute was "squarely inconsistent" with that of the Sixth Circuit). Sometimes, there exists a conflict on the basis of differences between the general reasoning involved in the two decisions – or more simply put that a decision below is wrong in the light of general principles. See *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-624 (1975) (certiorari granted on claimed "conflict in principle"; *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce*, 472

---

which only prohibits conspiracies to violate one of the substantive RICO provisions.

U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 733, 764 (1985) ("appeared to conflict in principle").

In sum, this Court should grant Certiorari based upon the precedents cited above, but more specifically because the decision below is wrong in the light of general principles.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted

Anthony R. Rizzo
Counsel of Record
99 Walnut Street
Saugus Massachusetts, 01906
(508)-231-5600

Roberta Golden
41 Pleasant Street
Framingham, Massachusetts, 01701
(508)-879-7373

Counsel for Petitioner

DECEMBER 30, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2286

UNITED STATES

Appellee

v.

STANTON D. SHIFMAN

Defendant - Appellant

Before

TORRUELLA, Chief Judge,
CAMPBELL, Senior Circuit Judge,
and BOUDIN, Circuit Judge.

ORDER OF THE COURT

Entered: November 24, 1997

Upon consideration of Defendant's Motion to Stay the Mandate,

It is ordered that the motion is hereby allowed.

The district court is hereby directed to vacate this Court's mandate of October 9, 1997 and to certify the record to this Court.

By the Court:

Vincent Flanagan, Acting Clerk.

By s/ JANICE M. O'NEIL
Chief Deputy Clerk

Cert. cc: Clerk, U.S. District Court

cc: Paul Holran, Esq.
Roberta Golden, Esq.
Dina Michael Chaitowitz, Esq.
Brian T. Kelly, Esq.
Donald Lockhart, Esq.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2286

UNITED STATES

Appellee

v.

STANTON D. SHIFMAN

Defendant - Appellant

Before

TORRUELLA, Chief Judge,
CAMPBELL, Senior Circuit Judge
and BOUDIN, Circuit Judge.

ORDER OF THE COURT

Entered: October 1, 1997

Upon consideration of appellant's petition for rehearing,

It is ordered that the petition for rehearing be denied.

By the Court:

Vincent Flanagan, Acting Clerk.

By s/ JANICE M. O'NEIL
Chief Deputy Clerk

cc: Paul Holran, Esq.
Roberta Golden, Esq.
Dina Michael Chaitowitz, Esq.
Brian T. Kelly, Esq.
Donald Lockhart, Esq.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2286

UNITED STATES

Appellee

v.

STANTON D. SHIFMAN

Defendant - Appellant

JUDGMENT

Entered: August 19, 1997

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Vincent Flanagan, Acting Clerk.

By s/ JANICE M. O'NEIL
Chief Deputy Clerk

cc: Paul G. Holran, Esq.
Donald C. Lockhart, Esq.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 96-2286

UNITED STATES,

Appellee,

v.

STANTON D. SHIFMAN,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before

Torruella, Chief Judge,

Campbell, Senior Circuit Judge,

and Houdin, Circuit Judge.

Paul G. Holian for appellant.
Donald C. Lockhart, Trial Attorney, with whom Donald K. Stern, United States Attorney, were on brief for appellee

---

August 19, 1997

CAMPBELL, Senior Circuit Judge. Stanton Shifman challenges his convictions on charges arising out of an illegal loan-sharking operation run by Joseph A Yerardi, Jr. He argues, inter alia, that there was insufficient evidence to support the convictions.

I.

Stanton Shifman and nine others were indicted on October 14, 1993 for multiple offenses based on their involvement in an illegal gambling and loan-sharking operation. Shifman, whose activities pertained only to the loan-sharking side of the operation, was charged with violation of, and

conspiracy to violate, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) & (d). He was also charged with four counts of aiding and abetting the making of extortionate extensions of credit, 18 U.S.C § 892(a), and a single count of aiding and abetting the collection of an extension of credit by extortionate means, 18 U.S.C. § 894(a).

Shifman was tried separately from the others. The government's evidence consisted primarily of the testimony of the alleged victims of the loan-sharking activities, seized records at loans, and admissions' made by Shifman to law enforcement officials. We recite the facts in the light most favorable to the verdicts being appealed. United States v. Valerio, 48 F.3d 58, 63 (1st Cir. 1995).

Joseph Yerardi operated a large-scale gambling and loan-sharking enterprise that made loans to borrowers at weekly interest rates of from 3 percent to 5 percent. These rates translate into annual interest rates of from 153 percent to 260

percent. The maximum legal annual rate allowed in Massachusetts is 20 percent. Mass. Gen. Laws. ch. 271, S 49.

Shifman first came into contact with Yerardi when he needed the loan shark's services because of his own mounting debt. Shifman subsequently borrowed from Yerardi numerous times and on each occasion made interest payments of 3 percent or 4 percent a week At times, Shifman fell behind in his weekly payments and was threatened with physical injury by a Yerardi employee, Jack Murphy, also known as Jack Kelley. At some point, Yerardi encouraged Shifman to refer anyone he knew in need of money to Yerardi. In return for these referrals, which totaled approximately ten over a twelve to sixteen month period, Shifman received either fees from the borrowers or "points" - a reduction in the interest rate on his loan - from Yerardi. Lieutenant-Detective William McDermott testified that Shifman admitted to him that Yerardi would reduce his

debt after he referred a customer who proceeded to take out a loan from Yerardi.

Much of the testimony came from the borrowers, Mark LaChance, Gerald Moore, Craig Inge, Randall Gasbarro, and Paul Mahoney, whose loans ware all documented by entries in the records seized from Yerardi.

LaChance testified that he approached Shifman, who he knew to be in the mortgage business, for legitimate financing on his construction equipment. Shifman told him the financing would come through without a problem. After weeks of waiting, LaChance, desperately in need of money, approached Shifman for help in obtaining a short term loan. Shifman referred LaChance to Yerardi, clearly conveying that Yerardi was a loan shark. The legitimate financing Shifman was allegedly procuring for LaChance never materialized.

Gerald Moore testified that he too was introduced to Yerardi by Shifman. He also testified that he was paying 4

percent interest a week on the money he borrowed from Yerardi, and that he knew that he would be physically hurt if he didn't repay the money. Moore gave a portion of the proceeds of his loan from Yerardi to Shifman. At one point, when Moore was behind in his payments, Jack Murphy and two other men visited Moore on Yerardi's behalf and attempted to break Moore's hand.

Craig Inge testified that he went to Shifman with the hope of obtaining legitimate financing for his video business. When the financing failed to materialize, Shifman referred Inge to Yerardi. Shifman represented that the loan with Yerardi would serve only to meet Inge's needs until the legitimate financing came through. Again, the legitimate financing never materialized. Inge paid Shifman $1,000 from the money he borrowed from Yerardi for what Shifman described as a fee for his services.

Randall Gasbarro and Paul Mahoney both testified that Shifman referred them to Yerardi. They both understood, from Shifman's description that Yerardi was a loan shark. Both men testified that they were paying 3 percent interest a week on the money they borrowed from Yerardi. Mahoney testified that he gave a portion of the money he borrowed from Yerardi to Shifman.

Another witness, Paul Terranova, testified that he approached Shifman for a second mortgage on his home. When the mortgage didn't come through, Shifman referred Terranova to Yerardi suggesting that the loan would be a short-term loan to tide him over until the mortgage came through. He also testified that he paid Shifman approximately $2,500, and that the mortgage never came through, causing him to remain indebted to Yerardi.

Shifman himself testified that he gave numerous people Yerardi's telephone number, and that these people would not

have known about Yerardi, nor would they have taken out extortionate loans from Yerardi, had he not referred them. Shifman testified to knowing Yerardi to be a loan shark, and that people could be physically injured if they did not repay the loans from Yerardi.

The jury found Shifman guilty of both violating RICO and conspiring to violate RICO. The jury also found Shifman guilty on all four counts at aiding and abetting the making of extortionate extensions of credit. The jury acquitted Shifman on the charge that he had aided and abetted the collection of an extension of credit by extortionate means. Shifman was sentenced to 51 months imprisonment. This appeal followed.

II.

A. Sufficiency of the Evidence

Shifman contends that the evidence was insufficient as a matter of law to support his convictions. "In reviewing sufficiency claims, we consider the evidence 'in the light most

favorable to the to the prosecution' and then ask whether the evidence 'would allow a rational jury to determine beyond a reasonable doubt that the defendant[] w[as] guilty as charged.'" United States v. Hurley, 83 F.3d 1, 11 (1st Cir. 1995) (quoting United States v. Mena Robles, 4 F.3d 1026, 1031 (1st Cir. 1993)), cert. denied ___ U.S. ___, 116 S. Ct. 1322 (1996).

1. The RICO Counts

For a defendant to be found guilty of a substantive RICO violation, the government must prove beyond a reasonable doubt that (1) the "enterprise affect[ed] interstate or foreign commerce, (2) that the defendant under consideration associated with the enterprise, (3) that [the] defendant participated in the conduct or the enterprise's affairs, and (4) that [the] defendant's participation was through a pattern of

racketeering activity." Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1558 (1st Cir. 1994)[1]

For a defendant to be found guilty or conspiring to violate RICO, the government must prove "(l) the existence of an enterprise affecting interstate commerce, (2) that the defendant knowingly joined the conspiracy to participate in the conduct of the affairs of the enterprise, (3) that the defendant participated in the conduct of the affairs of the enterprise, and (4) that the defendant did so through a pattern of racketeering activity by agreeing to commit, or in fact committing two or more predicate offenses." Id. at 1561.

---

1. Aetna dealt with a civil RICO claim, but it is appropriate to rely on civil RICO precedent when analyzing criminal RICO liability The standard is the same for both criminal and civil RICO violations. See 18 U.S.C. § 1962. The RICO Act differentiates between criminal and civil liability by providing for criminal penalties in 18 U.S.C. § 1963, and civil remedies in 18 U.S.C. § 1964.

Hence liability for a substantive RICO violation under § 1962(c) and liability for a RICO conspiracy violation under § 1062(d) rest on very similar elements. There are, however, two notable differences. As stated in Aetna:

> The major difference between a violation of § 1962(c) itself . . . and a violation of § 1962(d) based on § 1962(c) . - is the additional required element that the defendant knowingly joined a conspiracy to violate § 1962(c). Another difference is that, to prove that a defendant violated § 1962(c), it is necessary for the plaintiff to prove two predicate offenses; under § 1962(d), in contrast, this is not an element required to be proved. To prove a violation of § 1962(d), it is enough to prove that a defendant agreed with one or more others that two predicate offenses be committed.

Id at 1562.

a. The Substantive RICO Violation

i. Affecting Interstate Commerce

Shifman does not challenge the adequacy of the proof that Yerardi's loan-sharking enterprise affected interstate commerce.

ii. Association with the Enterprise

The second element of the substantive RICO violation is "that the defendant under consideration associated with the

enterprise." Id. at 1558. The jury could reasonably have found from the evidence presented that Shifman deliberately associated himself with Yerardi's enterprise. Not only did Shifman himself borrow from Yerardi, he referred borrowers to Yerardi with the goal of obtaining either a reduction in the interest rate on his own debt to Yerardi, or a cash fee from the borrower. Infra.

iii. Participation in the Conduct

The third element of the substantive RICO violation under § 1962(c) requires that the defendant have participated in the conduct of the enterprise's affairs. The Supreme Court has interpreted the phrase "to participate in the conduct of the enterprise's affairs" to mean participation in the operation or management of the criminal enterprise. See Reves v. Ernst & Young, 507 U.S. 170, 185 (1993). Appellant argues that there was insufficient evidence for the jury to find that his conduct met the "operation or management" test We disagree.

Reves differs from the present case in that it addressed the civil RICO liability of an independent adviser outside of the

RICO enterprise's chain of command. The Supreme Court held in Reves that an accounting firm employed by the enterprise could not be held civilly liable under RICO for preparing an inaccurate accounting statement as it had not "participate[d] in the operation or management of the enterprise itself." Id. Respecting Reves, we have said:

> Special care is required in translating Reves' concern with "horizontal" connections--focusing on the liability of an outside adviser--into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder. In our view, the reason the accountants were not liable in Reves is that, while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted.

United States v. Oreto, 37 F.3d 739, 750 (1st Cir. 1994).

We have held post-Reves, however, that a defendant who is "plainly integral to carrying out" the enterprise's activities may be held criminally liable under RICO." See id.

In the present case, Shifman was "plainly integral to carrying out" Yerardi's loan-sharking plans. There was evidence that Yerardi encouraged Shifman to refer persons in need of money to the enterprise and that Shifman did so on a

number of occasions. The evidence was plain that Shifman knew Yerardi to be engaged in illegal loan-sharking operations, that Shifman gave Yerardi's number to many people, and that the victims would not have known of Yerardi had Shifman not referred them. Shifman, moreover, could be found to have set up" certain victims so as to make it more likely they would borrow from Yerardi. He did this by first promising legitimate financing, and when this was not forthcoming, and they were desperate, offering them Yerardi's services. The evidence also supported a finding that Shifman benefitted financially from the transactions by either receiving points on his debt to Yerardi, or else obtaining fees from the borrowers.

The jury could infer that, but for Shifman's referrals, the extortionate loans to LaChance, Moore, Inge, Gasbarro, and Mahoney would not have taken place, and that these referrals were calculated and regular efforts taken by Shifman on behalf of the Yerardi enterprise. We are satisfied there was sufficient proof of Shifman's participation in the conduct of the enterprise's affairs, albeit at a relatively low level, to support the verdict.

iv. Pattern of Racketeering Activity

The final element for substantive RICO liability is that the defendant's participation was through a "pattern of racketeering activity."

In order to have engaged in a "pattern" of racketeering activity, a defendant must have committed at least two racketeering acts within ten years of one another. See 18 U.S.C. § 1961(5) These acts must be related and "amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989).

The definition of "racketeering activity" includes making or conspiring to make an extortionate extension of credit. See 18 U.S.C. § 1961(1) (defining "racketeering activity" in part as including an offense indictable under 18 U.S.C. § 892, which bans the making of extortionate extensions of credit). Aiding and abetting one of the activities listed in § 1961(1) as racketeering activities makes one punishable as a

principal and amounts to engaging in that racketeering activity. See 18 U.S.C. § 2.[2]

In this case, the racketeering acts that formed the basis of Shifman's RICO conviction were the four extortionate credit transactions he was convicted of aiding and abetting. Shifman contends there was insufficient evidence from which to find that he committed these racketeering acts.

In order to convict Shifman of aiding and abetting the making of extortionate extensions of credit, the government had to prove Shifman aided and abetted "[a]ny extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in

---

2. (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

the use of violence to the person, reputation, or property of any person." 18 U.S.C § 891(6).

A basic element of aiding and abetting is proof "that the defendant consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal." United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995).

The present record provided sufficient evidence for the jury to find that Shifman aided and abetted the making of the four extortionate extensions of credit. There was ample evidence that Yerardi's loans to LaChance, Moore, Gasbarro, and Mahoney were extortionate. The jury could infer an understanding between Yerardi and the borrowers that if a borrower delayed in repaying, violence would be used to force repayment. The rate of interest on the loans far exceeded the legal rate; legal collection means were unavailable. LaChance, Moore, Gasbarro, and Mahoney all testified to knowing that Yerardi was a loan shark. LaChance and Gasbarro were each told by Shifman that Yerardi was a hard money lender, and that

they should be aware of what type of person they were dealing with. Both understood this to mean that Yerardi was a loan shark. Moore was warned by Yerardi himself that violence would ensue if he did not make his payments on time. Mahoney testified that he understood Yerardi's business, as Shifman explained it, to be loan-sharking. Mahoney also understood that loan sharks would use force to collect payment. From this evidence the jury was entitled to find that there was an understanding between Yerardi and the borrowers that violence would be used if they failed to make their loan repayments.

There was also sufficient evidence at trial for the jury to find beyond a reasonable doubt that Shifman aided and abetted the making of these extortionate loans. Shifman knew that the loans Yerardi would make to the borrowers Shifman referred to him would be extortionate, having himself borrowed from Yerardi at an illegal rate of interest and, when he fell behind, having been threatened with violence by Yerardi's henchmen. Shifman informed the borrowers of the realities of doing business with Yerardi, with its potential for violence. It could be inferred that Shifman referred the borrowers to

Yerardi fully expecting them to take out loans from him. There was also evidence, as explained above, that Shifman was actively helping Yerardi find new borrowers in order to gain fees from the borrowers or a reduction in the interest rate on his outstanding debt to Yerardi. Accordingly, the jury was warranted in concluding that Shifman knowingly rendered tangible aid to Yerardi's loan-sharking activities and was desirous, in the case of the four borrowers, that those illegal activities succeed. The jury's finding that Shifman was guilty of aiding and abetting the extortionate extensions of credit involving these four men was amply supported.

b. The RICO Conspiracy

i. Affecting Interstate Commerce

As noted, Shifman does not challenge the sufficiency of the evidence offered to prove that Yerardi's enterprise affected interstate commerce.

ii. Knowingly Joining the Conspiracy

The second element of the conspiracy charge requires that the defendant "knowingly joined the conspiracy to

participate in the conduct of the affairs of the enterprise." Aetna, 43 F.3d at 1561. "All that is necessary to prove this element of the RICO conspiracy . . . is to prove that [the defendant] agreed with one or more co-conspirators to participate in the conspiracy." Id. at 1562. The evidence showed an agreement between Yerardi and Shifman for the latter to refer borrowers to Yerardi. The evidence also supported a finding of an understanding between Yerardi and Shifman that, at least in some cases, if Shifman referred a borrower to Yerardi who proceeded to take out a loan his own debt would be reduced. There was clearly sufficient proof of an agreement between Shifman and a co-conspirator for the former to have joined in the conspiracy.

iii. Participation in the Conduct

This element is identical to the third element of the substantive RICO violation. As indicated in our discussion of that element, supra, there is sufficient evidence to prove this element of the RICO conspiracy count.

iv. Pattern of Racketeering Activity

The fourth element of the RICO conspiracy violation is met if the defendant agrees to commit or actually commits two or more acts of racketeering activity. As discussed under the substantive RICO violation section, there was sufficient evidence for the jury to find that Shifman committed four of the charged racketeering acts. Accordingly, the fourth element is met.

2. Aiding and Abetting Extortionate Extensions of Credit

Appellant contends that there was insufficient evidence to convict him of the four substantive counts of aiding and abetting the extortionate extensions of credit. We have already considered and rejected this argument in the course of discussing the substantive RICO violations, supra.

B. Miscellaneous Trial Issues

1. The Cooperation Evidence

Appellant argues that the court erroneously excluded certain evidence showing his cooperation with government authorities; that the court unduly limited his counsel's opening statement; and that the pretrial stipulation that the government would not attempt to show that Shifman participated in

Yerardi's enterprise after he began cooperating with law enforcement officials in June of 1991 should have been read to the jury. All these matters, Shifman argues, tended to show a "consciousness of innocence" that he should have been able to place before the jury. We find no reversible error.

Turning first to the cooperation evidence, the jury was ultimately allowed to hear and to consider extensive evidence of Shifman's cooperation with law enforcement officials. It is not clear to us that the court excluded any significant amount of this evidence. We see no abuse of discretion in the court's handling of the cooperation evidence.

As for the alleged restriction on defense counsel's opening statement, we found no such restriction in the record. The court merely stated:

> I'm not going to preclude [appellant's attorney] from saying what he wishes in light of what I have said previously, that of course I have instructed and will instruct the jury again that what counsel says in opening statement is not evidence, and if he makes any promises to offer in evidence something that I have not ruled on, he's doing it at his peril.

We see nothing improper in these remarks.

Regarding the stipulation, appellant argues that it should have been read to the jury after the government said in its opening statement that Shifman told authorities "half the story." The government plausibly argues, however, that the "half the story" remark had to do with Shifman's pre-June conduct, unrelated to the stipulation. Shifman, however, did not then request that the stipulation be read at trial, so we review for plain error. Fed. R. Crim. P. 52(b). Under the plain error standard of review, appellant bears "the burden of persuasion to establish that there was an error, that the error was "clear" or "obvious," and that the error "affect[ed] substantial rights." United States v. Olano, 507 U.S. 725, 734 (1993).

We do not see how the district court's failure, on its own initiative, and without request, to read the pretrial stipulation to the jury amounted to an error of any kind. Nor has appellant met the burden of showing prejudice under Rule 52(b).[3] In accordance with the stipulation, he was not

---

3. Normally, "the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b). Olano, 507 U.S. at 735.

prosecuted for any offenses after his cooperation with law enforcement officials began in June of 1991. The government presented evidence pertaining to Shifman's conversations with police after June, but only to rebut Shifman's direct testimony concerning these conversations and his state of mind during the alleged offenses We find no prejudice to Shifman from the district judge's failure to advise the jury of the stipulation.

2. The Response to the Jury Question

Appellant contends that the court erred when, with his counsel's approval, it referred the jury to the written jury instructions in response to a question about conducting or participating in an enterprise's affairs. The government responds that Shifman waived any objection to the answer when his attorney explicitly agreed to the district judge's response to the jury question. See United States v. Rojo-Alvarez, 944 F.2d 959, 971 (1st Cir. 1991) (holding that there was waiver when defense counsel stated he was satisfied with the reworded instruction); see also United States v. Lakich, 23 F.3d 1203 (7th Cir. 1994) (holding that t here was waiver when counsel

explicitly agreed to the court's instruction). But see United States v. Marder, 48 F.3d 564, 571 (1st Cir. 1995) (waiver in these circumstances is an open question), cert. denied, 514 U.S. 1056 (1995). Regardless whether an actual waiver took place, we see nothing even remotely close to an error meeting the plain error standard.

Affirmed.